V SANDRASAGARAN VEERAPAN RAMAN

v.

DETTARASSAR VELENTINE SOUVINA MARIE

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[DIVORCE PETITION NO: 33-185-93]
7 OCTOBER 1998

FAMILY LAW: *Divorce - Maintenance, claim for - Law Reform (Marriage and Divorce) Act 1976, s. 60 - Principles - Short marriage - Children - Age of parties - Lapse of time before claim is made - "Clean break" principle*

The petitioner who sought to dissolve the marriage with the respondent was granted a *decree nisi* by mutual consent. In this instance, the respondent claimed for maintenance under s. 60 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

This court had to determine whether the respondent was entitled to the said financial relief in view of the following: (1) that both parties never lived together and continued to live apart until the grant of the *decree nisi*; (2) the marriage was never consummated; and (3) there were no children of the marriage.

Held:

[1] The respondent was seeking financial relief under s. 60 of the Act and the court was empowered to order maintenance, if necessary, by virtue of s. 77 of the Act.

[2] However, s. 77 of the Act might not be strictly applicable in view of the fact that the parties never lived together since the marriage and the marriage was never consummated.

[3] A long delay in claiming maintenance by the wife in cases of short marriage were factors that were considered by the courts along with other factors. In this instance, the respondent received no financial support from the petitioner and she did not make any attempt to claim for maintenance. She filed a claim for maintenance almost 7 years after marriage and that too after the petitioner had commenced divorce proceedings.

[4] It was a policy and trend of the courts that on the breakdown of a marriage, if possible, a clean break financially should be achieved. Where there is a short marriage which "lacked any permanence", the approach of the courts in achieving a "clean break" is by awarding a small lump sum so as to enable the party in a weaker financial situation to adjust herself to her financial situation.

[5] In deciding whether the respondent was entitled to financial relief from the petitioner, the court should take into consideration the means and needs of the parties. In assessing the means and needs of the parties, the court should have regard to the duration of the marriage, whether there were any children to the marriage, the age of the parties, whether the petitioner had financially supported the respondent during the duration of their marriage, the parties earning capabilities and whether the divorce would/ had affected her position financially.

[6] The long lapse of time had lead the petitioner to believe that there was no requirement or necessity for him to provide any financial assistance to the respondent. The court shall have regard to the lapse of time for making the claim where the duration of marriage is short.

[7] With no children to the marriage, the respondent would be able to adjust herself to her former position within a short period of time. Being a capable young woman and one who had worked before, she would be able to find a job and fend for herself.

[8] Having regard to the short duration of the marriage and the long lapse of time to file the claim, it would not be just to require the petitioner to provide for her financially on a monthly basis and not even a nominal sum.

[9] To enable the petitioner and the respondent to achieve a "clean break", the petitioner was ordered to make a one time payment of RM10,000 to the respondent.

[Order accordingly.]

Cases referred to:
Chambers v. Chambers [1980] FLR 10 ***(refd)***
Fraser v. Fraser [1982] FLR 3 ***(refd)***
Hayes v. Hayes [1982] CL Year Book ***(refd)***
Mcgrady v. Mcgrady [1980] FLR 1 ***(refd)***
Khan v. Khan [1980] 1 All ER 499 ***(refd)***
Krystman v. Krystman [1973] WLR 1 ***(refd)***
Rose v. Rose [1950] All ER 2 ***(refd)***
Sengol v. De Witt [1987] 1 ***(refd)***
Soni v. Soni [1984] 5 FLR 297 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 60, 77

For the petitioner - M Kalaichelvam; M/s Abdul Halim Usha & Assoc
For the respondent - Philip Adulphus; M/s Pathi & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

By a petition dated 23 June 1998, the petitioner had sought to dissolve the marriage which was contracted on 7 February 1991 on the basis that it had broken down irretrievably. The petitioner had alleged that the respondent had behaved in such a way that he could not reasonably be expected to live with her and that they had lived apart for at least a continuous period of two years immediately preceding the presentation of the petition.

The respondent had in her reply to the petition made a series of allegation against the petitioner and had also prayed for financial relief under s. 60 of The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('The Law Reform Act'). The petitioner had in his reply, strictly denied all the allegations made by the respondent.

Although the parties were legally married, the marriage was never solemnised according to Hindu custom owing to irreconcilable differences between the petitioner and the respondent which resulted in the parties living apart since the marriage and until the granting of the *decree nisi*. The marriage was never consummated and there were no children of the marriage.

However, the court had on 22 May 1998, by mutual consent of the parties, granted a decree nisi dissolving the marriage and adjourned all matters pertaining to ancillary relief to 9 July 1998. The court did not make any finding of fact as to the degree of responsibility of the parties for the breakdown of the marriage.

The petitioner is employed as a bank officer at the Bank of Commerce and his net income after deduction amounts to only RM4,007.81 and after a deduction of RM1242 per month towards a housing loan, the petitioner's take home pay amounts to about RM3,142.83. The petitioner had further stated that his household expenditure amounts to about RM1,747 per month, the breakdown of which being –

1. salary paid for a part-time maid	RM250
2. expenses for an invalid mother (inclusive of medication)	RM250
3. the petitioner's expenses	RM300
4. the petitioner's travelling expenses	RM300
5. A car loan from Multi Purpose Finance	RM447

6. other miscellaneous expenses (water, electric and telephone bills)	RM200
	RM1,747

During the economic boom the petitioner had borrowed money from various banks and financial institutions to invest in the Kuala Lumpur Stock Exchange. Due to the downfall in the stock market the petitioner had suffered excessive losses and he is now saddled with the month repayment towards the following loans:

1. Maybank Finance Bhd	RM273
2. Arab Malaysian Finance Bhd	RM267
3. Kewangan Bersatu Bhd	RM278
4. Bank Pertanian Malaysia	RM470
5. Bank Bumiputra (M) Bhd] (Interest for overdraft)]	
6. Arab Malaysia Bank Berhad] (interest for overdraft)]	RM780
	RM2,068

The petitioner has also taken personal loans by way of credit cards to settle the losses he has incurred in the stock market.

As for the respondent, she had not disclosed any particulars regarding her financial need or details of her monthly expenditure.

The Law

The respondent is seeking financial relief under s. 60 of the Law Reform Act 1976. The court is empowered to order maintenance for the respondent, if necessary, by virtue of s. 77 of the Law Reform Act 1976.

In considering financial provisions for the respondent, the court should primarily base its assessment on the means and needs of the parties regardless of the proportion such maintenance bears to the income of the spouse but to have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

However, s. 77 of the Law Reform Act 1976 may not be strictly applicable in view of the fact that the parties never lived together since marriage and the marriage was never consummated.

In looking at the factor of the shortness of the marriage Wood J in *Mcgrady v. Mcgrady* [1980] FLR 1 at p. 72 applied the following considerations to assist him in determining maintenance –

(1) the circumstances of the marriage itself;

(2) the length of cohabitation and whether there were children of the union;

(3) the ability of the wife to earn;

(4) whether she has been in fact earning;

(5) who has brought up any of the children of the union;

(6) who has maintained any of the children of the union.

A long delay in claiming maintenance by the wife in cases of short marriage were factors that were considered by the courts along with other factors. In the case of *Krystman v. Krystman* [1973] WLR 1 at p. 927 it was held that in all the circumstances, having regard to the short duration of cohabitation between the parties, the *de facto* separation for the 26 years and the fact that they had lead separate lives, it would not be right to require the husband to make any financial provision for the wife, even a nominal order.

He was of the opinion that the claim failed in the above case because the wife, who had received no support whatsoever financially from her husband, nor made any claim to such relief, until the husband in 1972 applied for dissolution of the marriage.

In the present case, the respondent received no financial support from the petitioner and she did not make any attempt to claim for any maintenance. The petition for divorce was served on her in 1993. It was on the 4 March 1998 almost seven years after the marriage did she file a claim for maintenance and that too after the petitioner has commenced divorce proceedings.

In *Mcgrady v. Mcgrady* [1980] FLR 1 at p. 71 Arnold J held the same view and held that the shortness of the marriage and the length of the separation are factors to be considered, with all the other factors which should be relevant in determining the amount of maintenance.

A long lapse of time before any claim was made for maintenance was held to be material in the case of *Chambers v. Chambers* [1980] FLR 10.

In *Fraser v. Fraser* [1982] FLR 3 at p. 99-100 where there was a lapse of time from 1964 until 1977 before any claim for maintenance was made, Lord Denning had referred to the statement of Wood J in *Chambers v. Chambers*

in which he stated, "when a wife lives on her own and keeps herself for a long time, it is very unusual for her to be able to come down on the husband afterwards claiming that he ought to maintain her" and held that "in these circumstances I think it would be unjust, unfair, unconscionable to say that the wife is entitled to periodical payments or a lump sum of any substances".

Hence in the case of *Khan v. Khan* [1980] 1 All ER at p. 499 it was held that "Where marriage was of short duration and the parties were young, a nominal order was the appropriate order unless there were children or the wife handicapped in some way which prevented her from working."

It is the policy and trend of the courts that on the breakdown of a marriage, if possible, a clean break financially should be achieved – see the case of *Chambers v. Chambers* [1980] FLR at p. 13.

In the circumstances where there was a short marriage which "lacked any permanence", the approach of the court in achieving a "clean break" is by awarding a small lump sum so as to enable the party in a weaker financial situation to adjust herself to her financial situation – see *Hayes v. Hayes* [1982] CL Year Book at para 940.

In the case of *Sengol v. De Witt* [1987] 1 at p. 201, the principle in *Hayes v. Hayes* was applied and the court held that where

> there was a very short marriage between two young persons, neither of whom has been adversely affected financially by consequences of the marriage and each was fully capable of earning his or her own living, the approach which the court should adopt was to allow the party who was in a weaker financial position (usually the wife) to adjust herself to her situation and thereafter to achieve a "clean break" facilitated if necessary by a small lump sum.

In the case of *Soni v. Soni* [1984] 5 FLR at p. 297 Sheldon J said

> I agree as a general rule wives should not be encouraged to regard a potential liability on the part of their husbands to make periodical payments as to use the same expression – a meal ticket for life – without there being any obligation on their part to fend or to provide for themselves. In all likelihood, moreover, the younger wife may be and the shorter the marriage (particularly if there are no children) the more difficult it will be for her to persuade the court that she is unable to earn her own living and to order her husband to make any substantial continuing provision for her.

In *Rose v. Rose* [1950] All ER 2 at p. 311 it was held whether the earning capacity of a wife is to be taken into account in assessing maintenance depended on the facts of each case, and no general rule could be laid down and Denning LJ in the same case reiterated further by saying that, if a wife does earn, her earning must be taken into account; if she is a young woman

with no children and obviously ought to go to work in her own interest, but does not, her potential earning ought to be taken into account.

Conclusion

The issue before this court is whether the respondent is entitled to financial relief from the petitioner. In deciding this issue the court shall take into consideration the means and needs of the parties. In assessing the means and needs of the parties the court should have regard to the duration of the marriage, whether there were any children to the marriage, the age of the parties, whether the petitioner had financially supported the respondent during the duration of their marriage, the parties earning capabilities and whether the divorce would/has affected her position financially.

The petitioner's marriage to the respondent was not even a "short marriage" in the sense that it never took off right from the start due to irreconcilable differences. The petitioner and respondent never lived together and continued to live apart until the grant of *decree nisi* on 22 May 1998. The marriage was never consummated and there was no children of the marriage.

The long lapse of time had lead the petitioner to believe that there was no requirement or necessity for him to provide any financial assistance to the respondent. The court shall have regard to the lapse of time for making the claim where the duration of marriage is short – see the case of *Krystman v. Krystman* at p. 927.

The respondent had admitted that she is highly educated and had taught French in a kindergarden school in her country before her marriage to the petitioner and that she speaks fluent French. With no children to the marriage, the respondent would be able to adjust herself to her former position within a short period of time. Being a capable young woman and one who has worked before, she will able to find a job and fend for herself.

Having regard to the short duration of the marriage, (the marriage never took off) and the long lapse of time to file the claim, it would not be just to require the petitioner to provide for her financially on a monthly basis and not even a nominal sum.

In the circumstances of the case to enable the petitioner and the respondent to achieve a "clean break" the court hereby orders the petitioner to make a one time payment of RM10,000 to the respondent. RM5,000 to be paid forthwith and the balance to be paid in ten monthly instalments starting from 1 October 1998.